

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



# 76-1196

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P/S

To be argued by  
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,  
  
Plaintiff-Appellee,  
  
-against-  
  
MOHENDRA BUDHU,  
  
Defendant-Appellant.

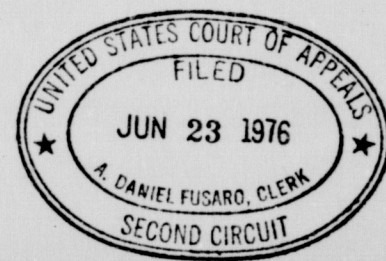
Docket Number 76-1196

BRIEF FOR APPELLANT  
MOHENDRA BUDHU

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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: UNITED STATES OF AMERICA, :  
: :  
: Plaintiff-Appellee, :  
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: -against- :  
: :  
: Docket Number 76-1196 :  
: :  
: MOHENDRA BUDHU, :  
: :  
: Defendant-Appellant. :  
: :  
-----X

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

1. Whether venue on Count Three was improperly laid in the Southern District in violation of the Sixth Amendment to the Constitution.
2. Whether the Government failed to prove that appellant violated 8 U.S.C. §1325.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Constance Baker Motley) rendered on April 16, 1976, after a jury trial, convicting appellant of making a false document in a matter within the jurisdiction of the Immigration and Naturalization Service (I.N.S.) (Count One) (18 U.S.C. §1001), falsely representing himself to be a United States' citizen (Count Two) (18 U.S.C. §911), and entering the United States at a place other than as designated by immigration officers (Count Three) (18 U.S.C. §1325). Appellant, who had been incarcerated for approximately five months, was sentenced to time served, and on May 26, 1976, was deported to his native country of Guyana.<sup>1</sup>

This Court granted leave to appeal in forma pauperis and continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

A. The Indictment<sup>2</sup>

On December 18, 1975, an indictment was filed charging appellant with three counts of violating federal law. Count One

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<sup>1</sup> The fact that appellant is not now in this country, does not render this appeal moot since appellant did not voluntarily flee the United States and his conviction has collateral consequences. See P. 14 of Appellant's Brief; United States v. Campos-Serrano, 404 U.S. 293 (1971).

<sup>2</sup> The indictment is "B" to appellant's separate appendix.

charged that appellant had made and submitted to I.N.S. a bogus document knowing that it contained the false information that appellant "had served in the United States Army from January 1, 1970 [sic] and had received an honorable discharge." Count Two charged that appellant falsely represented himself to be a United States citizen in an employment application, and Count Three charged that appellant illegally entered the United States in December, 1973, along the border between Canada and New York State, at a place other than as designated by immigration officers (8 U.S.C. §1325).

#### B. Pre-trial Motions

Prior to trial the Government moved to strike Count Three's allegations of the time and place of appellant's entry into the United States (6).<sup>3</sup> In support of the motion the Assistant United States Attorney explained that these allegations were surplusage and argued that the elements constituting a violation of the crime charged were: "that appellant be an alien, and that he be in the country, never having been so admitted pursuant to the regulation of the Immigration and Naturalization Service." (10; see also, 6,9). Defense counsel objected to this amendment of the indictment, contending that the Government had misconstrued the statute involved:

It [8 U.S.C. §1325] reads that whoever enters the United States at a time and place other than as designated. An ele-

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3 The numerals in parenthesis refer to pages of the trial transcript.

ment of that offense is actual entry,  
and also entry at a place other than,  
I think what is called, in Immigration  
language, an official port of entry.

(12)

The Court granted the Government's request after the evidence  
had been presented to the jurors (297).<sup>4</sup>

Also prior to trial, appellant moved to dismiss  
Count Three on the ground that venue in the Southern District  
of New York was improper (13). The Government opposed this  
motion and argued that since appellant was arrested in the South-  
ern District, venue had been properly lodged under 8 U.S.C. §1329,  
which permits the institution of prosecutions under 8 U.S.C. §1325  
wherever the accused may be apprehended.<sup>5</sup> Defense counsel con-  
tended that the Sixth Amendment of the Constitution, as applied  
to the facts of this case, conflicted with that venue provision  
and that the statute was therefore unconstitutional (14, 15):

The count as now charged charges him  
[appellant] with coming into the New  
York-Canadian border. That place of en-  
try, wherever along those hundreds of  
miles of border he may have entered at  
other than a port of entry, is not in  
the Southern District and I submit under  
the Constitution, that venue is not pro-  
perly laid in this district, regardless  
of the statute.

(15)

The district court held that venue was proper under the statute  
(16).

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4 In accordance with the District Court's ruling, prior to the  
charge, the indictment was retyped and later read to the jurors.  
Count Three of the retyped version read: "Mohendra Budhu, the  
defendant, an alien, unlawfully, wilfully and knowingly did enter  
the United States at a place other than as designated by immigra-  
tion officials" (296-297, 364).

5 Appellant was arrested on November 18, 1975 in Manhattan  
(253).

C. The Trial

At trial the Government's proof of the crime charged in Count Three consisted of an I.N.S. document read to the jurors (223, Government's Exhibit 5) and testimony that appellant had been arrested in Manhattan (253). The I.N.S. document states in part:

3. That after diligent search no record is found to exist in the records of the Immigration and Naturalization Service evidencing any lawful admission to the United States as an immigrant, or as a nonimmigrant, or the naturalization as a citizen of the United States, relating to Mohendra Partabji Budhu . . . .  
(Government's Exhibit 5)

Additionally, agent Robert Walsh testified about the general procedures followed by I.N.S. at ports of entry (156-160).

At the close of the Government's case, defense counsel moved to dismiss Count Three, on the ground that the Government had failed to show, as is required, that appellant had actually entered the United States at a place other than an official port of entry designated by immigration officers (238-246, 249). Moreover, defense counsel argued that §1325 proscribed entry into the United States by an alien in at least four ways;<sup>6</sup> that appellant had been charged with one

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6 One way is to sneak around a port of entry. A second is to sneak through a port of entry at a time when it is closed. A third way is to elude examination or inspection by immigration officers . . . .

The fourth way is to obtain entry by false or misleading representation or a wilful concealment of a material fact.

(240)

of those ways; and that proof of appellant's being in the United States simply did not establish a violation of the statute (240 - 245). Rather, defense counsel asserted that in order to sustain its burden of proof, the Government was required to show that appellant entered this country in the specific illegal manner charged in the indictment (244).

The Assistant United States Attorney disagreed, arguing that appellant's mere presence in the United States coupled with the Government's failure to find a designated place and time of entry, constituted a violation of the statute as charged (245).

The District Court denied the motion to dismiss Count Three (246).<sup>7</sup>

After the conclusion of the defendant's case, defense counsel renewed his prior motions and again requested dismissal of Count Three (269).<sup>8</sup>

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7 The District Court's oral opinion is reproduced as "D" to appellant's separate appendix.

8 In addition, defense counsel requested jury instructions which were consistent with his position that the Government had failed to prove a violation of 8 U.S.C. §1325. Thus, he asked the District Court to tell the jurors that they must exclude beyond a reasonable doubt the possibility that appellant entered the United States in a manner made illegal by those subsections of §1325 not charged in the indictment (entry by eluding examination or inspection by immigration officials or by a willful, false, and misleading representation or concealment of a material fact) (278-279, 280-283). These requests were denied (286, 289).

After deliberations, appellant was found guilty as charged.<sup>9</sup>

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9 William Strasser, an attorney with I.N.S., testified as part of the Government's case on Count One (89). Strasser testified that on an application to file a petition for naturalization, appellant (41) indicated that he had served in the Army and reserves (45). James Peterson, an employee of the Army, also testified. He stated that after a search, computer printouts kept by the Army and the General Services Administration indicated that no military records were maintained for appellant (67), that no record of military pay was found (96), and that no record of appellant's service in the particular Army unit listed on the immigration application was located (97).

As part of the Government's proof of Count Two, appellant's employment application was admitted in evidence (125, Exhibit 3C). A box on that application, indicating that appellant was a United States citizen, had been checked. Appellant does not challenge his conviction on Counts One and Two. However, his conviction on Count Three has severe, independent collateral consequences and therefore, is not harmless. See p. 14 of Appellant's Brief, infra.

POINT I

VENUE ON COURT THREE WAS IMPROPERLY LAID IN THE SOUTHERN DISTRICT IN VIOLATION OF THE SIXTH AMENDMENT TO THE CONSTITUTION.

Constitutional guarantees require that a case be tried in the proper place or venue. Article III, §2, Cl.3; Amendment Six. "... questions of venue are more than matters of mere procedure," Travis v. United States, 364 U.S. 631, 634 (1961). "They raise deep issues of public policy in the light of which legislation must be construed," United States v. Johnson, 323 U.S. 273, 276 (1944).

The Sixth Amendment to the Constitution assures to an accused:

... public trial ... [in] the State  
and district wherein the crime shall  
have been committed ...

The purpose of this provision is to avoid "the unfairness and hardship to which trial in an environment alien to the accused exposes him," United States v. Johnson, *supra*, 323 U.S. at 273; United States v. Cores, 356 U.S. 405, 408 n.6 (1958), to prohibit "prosecution remote from home and from appropriate facilities for defense," United States v. Johnson, *supra*, 323 U.S. at 275, and to prevent "the appearance of abuses, if not... abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." United States v. Johnson, *supra*, at 275. See also, United States v. Fernandez, 480 F.2d 726, 731 (2d Cir.

1973). Orfield, "Venue of Federal Criminal Cases," 17 U. Pitt. L. Rev. 375, 379 (1956). Because this constitutional guarantee was violated here, reversal is required.

It is clear that the venue provision of the Sixth Amendment requires that: "a defendant must be tried in the district where the alleged crime was committed". United States v. Bithoney, 472 F.2d 16, 28 (2d Cir. 1973); Salinger v. Loisel, 265 U.S. 224, 232 (1924); Hass v. Henkel, 216 U.S. 462, 473 (1910); Burton v. United States, 202 U.S. 344, 381 (1906); In re Palliser, 136 U.S. 257, 265 (1890); United States v. Fernandez, 480 F.2d 726, 731 (2d Cir. 1973); United States v. Flaxman, 304 F. Supp. 1301, 1303 n.5 (S.D.N.Y. 1969).

In this case, the Government conceded that there was no proof that appellant committed the crime charged in Count Three in the Southern District (245).<sup>10</sup> Instead, ignoring the plain requirements of the Sixth Amendment, the Government sought to justify appellant's prosecution in the judicial district of his arrest by relying on the venue provisions of 8 U.S.C. §1329.

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10 In fact, Count Three of the indictment shows that prior to trial, it was the Government's theory that appellant had illegally entered the United States in either the Northern or Western District of New York.

This Count read:

In or about December, 1973, Mohendra Partabji Budhu, the defendant, an alien, unlawfully, willfully, and knowingly did enter the United States along the border between Canada and the State of New York, at a place other than as designated by immigration officers.

(Record on Appeal, Doc. No. 1.  
Appellant's Appendix B)

8 U.S.C. §1329 states in part:

Notwithstanding any other law, such prosecutions . . . [of 8 U.S.C. §§1325, 1326] . . . may be instituted at any place in the United States . . . at which the person charged with a violation . . . may be apprehended.

This statute is invalid. The problem with it and the Government's reliance on its provisions in this case is that allowing prosecution to occur in the district of arrest violates the Sixth Amendment's right to trial in the judicial district where the crime occurred. See generally United States v. Cores, *supra*, 356 U.S. at 407. Thus, 8 U.S.C. §1329 conflicts with the Constitution and is void. Marbury v. Madison, 1 Cranch 137, 177-180 (1803).

While Congress may have the power to "fix venue at any place where a crime occurs," United States v. Johnson, *supra*, 323 at 278 (Murphy, concurring); Orfield, *supra*, 381, this power is restricted by the requirement that venue is proper only in a locality "through which force propelled by an offender operates." United States v. Johnson, *supra*, 323 U.S. at 275.<sup>11</sup> Accordingly, Congress has provided that those offenses, considered to be "continuing" may be tried in the district where they began or are completed. 18 U.S.C. §3237(a). See also, Wright Federal Practice and Procedure, §303 (1969). However,

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<sup>11</sup> One commentator has noted:

Special venue provisions cannot, of course, override the constitutional requirement of venue in the place where the crime is committed, but they can indicate legislative definition of such place or places.

(8 Moore's Federal Practice, §18.02[1], n.4, p.18-6)

appellant's prosecution in the Southern District cannot be justified as a prosecution of a continuing offense under §3237(a), since, as the Supreme Court has indicated, the crime charged here is completed in the judicial district where entry occurred:

Those offenses [8 U.S.C. §§1325, 1326] are not continuing ones, as 'entry' is limited to a particular locality and hardly suggest continuity.

(United States v. Cores, supra, 356 U.S. at 408 n.6.)<sup>12</sup>

Because there was no proof of entry in the Southern District, 18 U.S.C. §3237 is inapplicable .

Venue lodged under 8 U.S.C. §1329 is invalid under the specific terms of the Sixth Amendment. Moreover, the operation of this statute violates those policies and principles which the Sixth Amendment was designed to foster. §1329's continued validity will have the effect of completely abrogating the historical guarantees of the Sixth Amendment by allowing Congress the power to require that every crime be prosecuted wherever the person charged may be arrested.

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12 In Cores, the Supreme Court also suggested that because §1325 offenses were not continuing crimes, "a specific venue provision . . . was required before illegal entry cases could be prosecuted at the place of apprehension." United States v. Cores, supra, 356 at 408 n.6. This inadvertent statement is not controlling here and should not be interpreted as tacit approval of the constitutionality of §1329, since the constitutional issue raised by the facts in this case was neither presented or addressed by the Court in Cores. See United States v. Wiley, 519 F.2d 1348, 1351 (2d Cir. 1975).

POINT II

THE GOVERNMENT FAILED TO PROVE  
THAT APPELLANT VIOLATED 8 U.S.C.  
§1325

Count Three of the indictment charged that appellant had entered the United States at a place other than as designated by immigration officers. The Government's proof showed that appellant had been arrested in the Southern District of New York and that there were no I.N.S. records establishing appellant's lawful admission to the United States. This was insufficient to prove that appellant had committed the crime charged.

8 U.S.C. §1325 reads in part:

Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor . . . and for a subsequent commission of any such offenses shall be guilty of a felony. . .

Thus, each of §1325's three subsections makes illegal one method by which an alien could gain entry into the United States. See C.J.S. Aliens §250(a). United States v. Oscar, 496 F.2d 492 (9th Cir. 1974). Appellant was charged with a violation of subsection one-entering at a place other than as designated by immigration officers. Entry is defined

in 8 U.S.C. §1101(13), as "any coming of an alien into the United States." See also, United States v. Vasilatos, 209 F.2d 195, 197 (3rd Cir. 1954); In Re Dubbiosi, 191 F. Supp. 65, 66 (E.D.Va. 1961). As the Supreme Court has stated in comparing those crimes set forth in 8 U.S.C. §§1325 and 1326 to the crime of unlawfully remaining in the United States, the offense of entering is limited to a particular locality. United States v. Cores, 356 U.S. 405, 408 n.6 (1953). Thus, the Government was required to prove that appellant had actually come into the United States at a specific location not designated a port of entry by the authorities.

However, the proof here failed to show the existence of these facts. Rather it simply indicated that no record of lawful entry could be found. This evidence was insufficient, since the jurors could not properly infer from this fact that appellant had circumvented a designated port of entry and avoided immigration inspection. United States v. Doyle, 181 F.2d 479 (2d Cir. 1950). This inference that §1325(1) had been violated was clearly impermissible since I.N.S. does not maintain records of entry for all classes of aliens who enter the United States (159-160; 8 C.F.R. §212.1; 22 C.F.R. §41.6).

In United States v. Doyle, supra, the defendant was charged with violating 8 U.S.C. §180(a), the predecessor statute of §1325, by obtaining entry into the United States by making false and misleading misrepresentations to immigration officials

and by willful concealment of a material fact. As it did here, the Government in Doyle relied on the defendant's presence in the United States to show a violation of the statute. This Court held that evidence insufficient:

For, from defendant's presence in this country, the jury could not properly infer that he must have made false or misleading representations or been guilty of willful concealment. For all that appears, he might have come in by 'eluding' the immigration officers, or might have entered the country at a time or place not officially designated.

United States v. Doyle,  
supra, 181 F.2d at 480.

Thus, this Court in Doyle held that in prosecutions under 8 U.S.C. §180(a) (now 8 U.S.C. §1325), the Government's proof must negate the possibility that the defendant violated a subsection of §1325 not charged. This reasoning is applicable to this case. As in Doyle, supra, the proof here was insufficient, since it failed to deny the possibility that appellant gained entry into the United States in a manner not charged in the indictment, even though prohibited by a subsection of §1325. United States v. Doyle, supra.

Appellant's conviction on Count Three has independent collateral consequences. Although a first conviction for this offense is a misdemeanor, subsequent convictions are felonies. 8 U.S.C. §1325. Consequently, despite the fact that appellant received a concurrent sentence of imprisonment on all three counts of the indictment, his conviction on Count Three is not harmless.

CONCLUSION

FOR THE FOREGOING REASONS, THE  
JUDGMENT OF THE DISTRICT COURT  
MUST BE REVERSED AND REMANDED  
WITH INSTRUCTIONS TO DISMISS  
COUNT THREE.

Respectfully submitted,

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CERTIFICATE OF SERVICE

June 23, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Jonathan Hilberman